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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 84

ALUMINUM COMPANY OF AMERICA and CUPPLES PRODUCTS CORPORATION, *Appellants,*

v.

UNITED STATES OF AMERICA, *Appellee.*

On Appeal From the United States District Court for the Eastern District of Missouri

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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INTRODUCTION

The district court, without findings of fact, conclusions of law or opinion explaining the basis for its action, has ordered Alcoa to divest a $2.8 million plant at Corona, California, which it built more than two years after the Cupples acquisition and which was not found, or even alleged, to be held in violation of law. It was shown in the Jurisdictional Statement that the disputed order is not supported by a finding that the public interest requires divestiture of the Corona

plant (J.S. 12-16), and that, in fact, the record would not support any such finding (J.S. 16-21). This is the first time an order to divest after-acquired property has been before this Court.

The Motion to Affirm portrays this appeal as presenting "only a single narrow issue as to the scope of divestiture" (Motion 1), and argues that it is too insignificant to "warrant plenary consideration by this Court" (Motion 7). The implicit premise of this contention—that questions of relief are inherently less important than those of substantive law—is untenable, for it is well-settled that "the choice of remedy is as important a decision as the initial construction of the statute and finding of a violation."[1] Significantly, the Government, itself, has not hesitated to present questions regarding the scope of divestiture when it has failed to obtain the desired relief from the trial court.[2]

This appeal, we submit, presents substantial and unresolved questions regarding the use of divestiture with respect to after-acquired or after-created properties (J.S. 15-21). In this era of active Section 7 enforcement, these are issues of great importance to the courts and antitrust enforcement agencies as well as to the business community.[3] In addition, fundamental questions are raised as to the trial court's obligation to make findings of fact and conclusions of law in support

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[1] *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 130 (1962).

[2] See, e.g., *United States* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316 (1961); *Maryland & Virginia Milk Producers Ass'n.* v. *United States*, 362 U.S. 458 (1960).

[3] Nor should the alleged narrowness of the issue obscure the fact that a very substantial Alcoa investment is involved. The cost of Corona, $2.8 million, is more than 40 per cent of the value of Alcoa stock used for the purchase of Cupples itself (GX 16; R. XVI 116).

of its decision on relief (J.S. 12-16). These issues merit plenary review, and nothing in the Government's arguments as to the alleged correctness of the disputed order leads to a different conclusion.

1. The Order Under Review Contemplates Separate Divestitures of Cupples and the Corona Plant

[Motion, Point 1, 7-10]

If, as shown in the Jurisdictional Statement (J.S. 11-12, 17), the disputed order permits separate divestitures of Corona and Cupples, this would eliminate the most plausible justification for divestiture of Corona, namely, that divestiture of Cupples as a going concern requires the inclusion of Corona. Recognizing this, the Government now attempts to show that the district court has entered a unitary divestiture order which "requires Alcoa initially to offer all three plants [including Corona] for sale and to permit a purchaser, if he wishes, to acquire as a going concern all the facilities that Cupples had while Alcoa owned it" (Motion 7). Under this theory, only if there is no prospective purchaser of Cupples who wants the Corona plant would Alcoa be free to dispose of it separately (Motion 9). Though closely akin to the unitary divestiture theory of the Government's Proposed Final Judgment, which the district court rejected, the Government's theory on appeal was not presented to, or articulated by, the district court. It is merely one of "appellate counsel's *post hoc* rationalizations" for the court's action.[4]

The Government's new theory is refuted by the history and language of the disputed order. On November 18, 1964, the Government submitted its Pro-

[4] *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 168 (1962).

posed Final Judgment calling for a unitary divestiture of Cupples and Corona (R. XIV 2907 A-B). After hearing, at which appellants stressed that Corona was sustaining heavy losses and would be a liability to the divested Cupples (DXR 52; R. XIV 2995, 3027-32), the court rejected the Government's proposal and in separately numbered subparagraphs of Paragraph 2 ordered Alcoa to divest (1) Corona; and (2) Cupples (J.S. App. 24a-25a). At the same time, the court adopted Paragraphs 3 and 4 of the Government's Proposed Final Judgment, except for a significant conforming change in the final sentence of Paragraph 3, which changed "divestiture" to "divestitures," so that the sentence then read: "Divestitures shall then be accomplished by defendants in accordance with the plan approved by the Court" (R. XIV 2907 B; J.S. App. 25a).

If the district court had meant to adopt the Government's unitary divestiture theory, it would have been perfectly simple to insert language requiring Alcoa to offer the Corona plant as part of Cupples in the first instance. Not only was this not done, but, as shown, the court switched to the plural when referring to the *sales* Alcoa would be required to make pursuant to the Judgment. The inference is inescapable, therefore, that the unitary divestiture concept was rejected by the court.

In view of the above, it is indeed puzzling that the Government should now rely on the court's alleged use of the term "the divestiture" in the singular (Motion 8). Such usage occurs when the court is referring generally to the two-part divstiture ordered in Paragraph 2; as shown, when referring to the sales Alcoa would be required to make, the court adopted the plural. Since the Motion to Affirm does not mention,

much less explain, the court's important shift from singular to plural, it can only be assumed that the Solicitor General was unaware of it.

There is little need to consider in detail other arguments advanced by the Government. It is particularly absurd to suggest that divestiture of Corona as part of Cupples "may be essential" to the reconstitution of Cupples "as a going business" (Motion 8). Before the acquisition, Cupples, without Corona, was the nation's leading producer of aluminum curtain wall (J.S. App. 22a-23a). If anything, it will now be an even stronger "going business" since its original plants have been expanded and improved at a cost to Alcoa of over $1.5 million (J.S. App. 18a; GX 53, 54, R. XVIII 423, 425). The absurdity is compounded by the fact that the Corona plant, which was shown to be a badly losing proposition at the time of the divestiture proceedings (DXR 52, R. XIV 2995, 3027-32), was later permitted to be shut down because of "substantial and continuing losses," which the district court found were "adversely affecting the strength and viability of Cupples," and would "continue to do so unless the Corona plant is shut down" (R. XV 3190). The evident contemplation of the district judge thus is that the Corona operation will not be a "going business" and could not be divested as such.

The motion at pages 8-10 merely offers reasons why it might have been wise for the district court to order a unitary divestiture. This free wheeling discourse is not supported by a single citation to the record, and, in fact, is refuted by the evidence. While Cupples had considered building a West Coast plant, the undisputed evidence is that it would have done so on a much smaller scale, and that it would have withdrawn if the

West Coast curtain wall market failed to materialize (R. XIV 3015-17). Nor is there merit in the Government contention that "a prospective purchaser might well consider an existing [West Coast] facility . . . to be an important asset of the Cupples business" (Motion 9), for the court has found "no reasonable grounds for believing" that Corona's substantial losses will not continue (R. XV 3190). Finally, the Government's claim that Alcoa's retention of Corona, even if subject to an injunction against "making curtain wall and/or related products, . . . might chill the interest of prospective purchasers of Cupples" (Motion 10), is sheer speculation, without either evidence or reasoned argument to support it.

In sum, the Final Judgment contemplates two separate divestitures, and, therefore, the order to divest Corona cannot be rationalized as necessary to effect the divestiture of Cupples as a going concern.

2. The District Court Has Not Found, and the Evidence Does Not Establish, That Corona Is the "Fruit" of the Cupples Acquisition

[Motion, Points 1a and b, 10-15]

The Government states that "the district court's *findings* and the supporting evidence fully establish that the Corona plant was one of the 'fruits' of Alcoa's acquisition of Cupples." (Motion 10, emphasis added). This, again, is inaccurate and misleading. The only findings cited are those made by the district court when it entered a preliminary injunction concerning the use of Corona *pendente lite*. Those findings, however, as the court made clear, were "for the exclusive purpose of this Motion for Preliminary Injunction" (R. V 630), and did not, and could not, reflect con-

sideration of the evidence adduced on this issue at the hearing on relief. In fact, there were no findings on the "fruit" question or on any other aspect of the Corona divestiture, and this deficiency is itself reversible error (J.S. 12-16).[5]

Moreover, the "fruit" theory does not appear to be seriously advanced as a justification for divestiture, since the Government concedes, first, that if no prospective purchaser of Cupples wants Corona, it would consider a "modification of the Judgment to permit [Alcoa] to retain the Corona plant subject to suitable restrictions on its use . . ." (Motion 9-10); and, second, that such restrictions "would, of course, prevent Alcoa from gaining certain competitive advantages from the illegal acquisition" (Motion 16). Thus, even the Government acknowledges that injunctive relief could effectively strip Alcoa of the alleged "fruits" of the acquisition.[6]

In any event, Corona cannot fairly be considered the "fruit" of the Cupples acquisition (J.S. 17-19):

First. The Government's contentions that "the plant embodies Cupples' know-how, at least in layout

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[5] See *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110, 129-30 (1948), where this Court "set aside the divestiture provisions of the decree" and remanded the case for "findings necessary for an appropriate decree," including, *inter alia*, findings that would "reveal what the rewards of the conspiracy were . . . and what would be the preferable way of causing appellants to surrender them."

[6] Furthermore, there are as yet unresolved issues as to the applicability of the "fruits" doctrine in Section 7 cases. The only cases cited by the Government involved hardcore Sherman Act violations (Motion 13-14), and the "fruit" concept appears never to have been invoked in cases arising under Section 7 of the Clayton Act.

and design" and that the great value of such know-how induced Alcoa to acquire Cupples (Motion 14) are refuted by undisputed evidence that the Cupples know-how desired by Alcoa was in the design and marketing of aluminum curtain wall, not in the design of curtain wall plants; that Cupples had no special capability in designing such plants; and that Alcoa, with its many years' experience in the aluminum business, could readily have designed and built Corona without assistance from Cupples (J.S. 18; R. XIV 2929-75, 3019-24; DXR 2-47).

Second. There is nothing sinister about Alcoa's arrangements with respect to title to the Corona plant, nor do these arrangements bear on the "fruit" issue. Alcoa does not contend that its ownership of Corona would immunize it from divestiture if such divestiture were really required in order to redress the violation. Alcoa retained title because this accurately reflected the true facts, namely, that Corona was not an asset of Cupples at the time of acquisition, and hence was not part of the acquisition challenged by the Complaint. Retention of title was not intended to, and could not, assure "continued participation in the industry" (Motion 13).

Third. There is no indication that the court itself relied on the "fruit" theory in ordering divestiture of Corona. On the contrary, insofar as the court's mental processes are revealed at all, its real objective seems to have been to deny Alcoa use of the plant "as a means of getting into the business" (R. XIII 2881-82). This objective, as the Government now concedes, can be achieved by appropriate injunctive relief (Motion 10, 16; J.S. 19-21).

3. An Appropriate Injunction Would Effectively Redress the Violation

[Motion, Point 2, 15, 16]

It is argued that divestiture of Corona must be upheld because "no injunction, however broad in scope, will or can provide as effective relief as divestiture of the Cupples' portion of the business" (Motion 15). Admittedly, divestiture, the "most drastic" of antitrust remedies, is also the "most effective";[7] but it is not the necessary and inevitable remedy in every case. On the contrary, as this Court has held, it is the duty of the courts to give effect to the prohibitions of the statute "with as little injury as possible to the interests of private parties or the general public" and "to tailor the remedy to the particular facts of each case so as to best effectuate the remedial objectives just described." *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 130 (1962).

The Government's specific objections to injunctive relief are completely untenable. It is true that such relief would not assure to the purchaser of Cupples an opportunity to acquire the Corona plant, but such opportunity is competitively meaningless for there is no continuing business at Corona, the court having permitted it to be shut down. Nor is there any factual basis for the claim that it would be difficult to police an injunction. Even if Alcoa were likely to disobey such a decree, which it emphatically is not, the products affected are easily identified and could not be sold with-

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[7] *United States* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316, 326 (1961).

out the instantaneous knowledge of Alcoa's competitors.[8]

Finally, the Government asserts that "Alcoa cannot show how it would be injured by being required to sell the Corona plant at its market value" (Motion 16). This argument hardly merits reply. It is extremely doubtful that fair market value could be realized in a forced sale, especially in view of Corona's enormous losses; but even if it could, in a free society neither Alcoa nor anyone else should be forced to sell its property against its will in the absence of a judicial determination that such sale is required by paramount public interest considerations. Cf. *Gilbertville Trucking Co.* v. *United States, supra,* 371 U.S. at 130-31.

4. The District Court's Failure to Comply with Rule 52(a) Is Reversible Error

[Motion, Point 3, 16-17]

The Government, though conceding that "it is the better practice for a district court to make findings explaining the basis of the relief granted," argues that the lack of such findings is not reversible error (Motion 16). This Court, however, has not tolerated failure to make such findings, but has repeatedly set aside remedial judgments where, as here, the court or agency failed to explain its reasons for selecting a harsh

[8] There is no meaningful comparison between a straightforward injunction against the manufacture and sale of specific, easily-identified products and the type of injunction that would have been required in the *duPont-General Motors* case on which the Government relies (Motion 16). The injunctive provisions rejected in *duPont* were intended to restrain subtle forms of intercorporate favoritism and, as this Court observed "could hardly be detailed enough to cover in advance all the many fashions in which improper influence might manifest itself." 366 U.S. at 334.

edy when some less severe alternative might have ceed. *Gilbertville Trucking, supra,* 371 U.S. at 129-Schine Chain Theatres, Inc. v. *United States, supra,* U.S. at 126-29; *Burlington Truck Lines, Inc.* v. ed States, 371 U.S. 156, 165-70 (1962); *Jacob el Co.* v. *FTC,* 327 U.S. 608 (1946); *Phelps Dodge* o. v. *NLRB,* 313 U.S. 177, 189-97 (1941). In view le explicit holdings of these cases, we are at a loss to erstand the Government's inability to find any case which the lack of findings as to the reasons for relief granted has precluded the court from testing propriety" (Motion 17).

CONCLUSION

or all of the foregoing reasons, we respectfully mit that the Motion to Affirm should be denied and able jurisdiction noted.

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